

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 4

2021

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Companies (Amendment) Act 2019 and 2020, A Holocaust of Criminal Justice Shredded under Corporate Criminal Liability

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ABSTRACT

The Companies (Amendment) Act 2019 and 2020 have decriminalised numbers of provisions which were hitherto panel provisions under the Companies Act 2013. Under these amendments, provisions were made tortious liability by the sanction of compensation. The Company Act 2013 was enacted on the background of the recommendation of the working committee to rewrite the Companies Act on the aftermath of the new economic policy incorporated in 1991 which brought globalisation and liberalisation authority economy. The Company Act 2013 also provide a reinforcement to the deteriorating situation of corporate governance in India by the menace of corporate fraud and corporate malpractices in the nineties, which was reflected in the collapse of Satyam Online, UTI and many other stock exchange fraud. The western common law countries have dealt with such situation very sensitively by enacting stringent panel legislation. In USA, they brought Sarbanes Oxley Act of 2002 and in Australia, the Australian Criminal Code Act 1995. These laws have adopted very sophisticated mechanism by evolving new principles of criminal liability of corporation to curb effectively the menace of corporate crime. Even after enacting the companies Act 2013 in India, there was frequent incident of corporate fraud which caused serious harm to the economy of the country. In such a situation decriminalising number of provisions in the Companies Act 2013 in a hasty way shall not be considered as a measured action by any knowledge of legisprudence. This article through lights on the socio-legal background of the Companies (amendment) Act 2019 and 2020 and its probable socio-economic impacts.

Keywords: *Companies (Amendment) Act, Penal provision, Tortious liability, Sarbanes-Oxley Act 2002, Australian Criminal Code Act 1995*

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I. INTRODUCTION

In the year 2019 and 2020, the Companies Act 2013 has been amended which decriminalised numbers of panel provisions and imposes tortious liability on all those acts which had panel liability under the Companies Act 2013. This amendment has been brought in such a time when the entire country and its economy are under the menace of corporate fraud and corporate crime. The criminal law has its deterrent effect and effective in curbing the tendency of wrongdoings, but the loss arising out of this type of corporate crime cannot be meted out by any compensation. In such a situation, decriminalising a number of provisions is marking just a slipping down the stairs of law reform in this area.

II. BACKGROUND OF THE PASSING OF THE COMPANIES ACT 2013

The Companies Act 2013 was enacted as a measure to curb the menace that facing the country due to incident that took place in India due to corporate malpractices and fraud. The collapse of UTI and Satyam Online and series of stock market fraud shock the conscience of the Indian legislature. Before the passing of the Act, the Indian economy has suffered a series of corporate malpractices and financial fraud which led to serious economic breakdown in the year 2008. The sudden collapse of Satyam Online in the year 2009, serious malpractices in the operation of UTI and consequent collapse in the year 2000, Sahara India scam in the year 2009, Sharada chit fund scam in the year 2013, serious malpractices and fraud in Kingfisher in the year 2012, all these appears on the screen one after another. Other than these there were serious manipulation in the stock exchange by Ketan Parekh and Harshad Mehta which led to the collapse of UTI and losing of entire life saving of millions of marginal investors². These companies were appeared to involve in stock exchange fraud and manipulation of books of accounts. The rampant increase of such socio economic crime committed by the corporations and companies attracted the serious attention of the legislature³.

At the same time it was felt that The Companies Act 1956 has been almost obsolete and it cannot regulate the expanding sphere of corporate affairs in the global economy. It was felt that a company law which ensure more transparency and accountability in the corporate governance is *sine qua non* for the healthy growth of industrial development .After the wave of liberalisation and globalisation of 1991, the Working Group to rewrite the Companies Act has been constituted by the Government of India in the year 1996. The task before the

² Sharma Sumit, (2013), Corporate Crime and Financial Fraud, p184-201, Authors Press, New Delhi.

³ Hindustan Times. 2021. Satyam scam: All you need to know about India's biggest accounting fraud. [online] Available at: <<https://www.hindustantimes.com/business/satyam-scam-all-you-need-to-know-about-india-s-biggest-accounting-fraud/story-YTfHTZy9K6NvsW8PxIEEYL.html>> [Accessed 22 August 2021].

working group was to frame the company law which can facilitate the development of corporate sector in the liberalized, fast changing and highly competitive environment with the concept of accountability. The flexibility, self-regulation, transparency and accountability were the '*mantra*' in the recommendation of the working group⁴. The newly enacted Companies Act, 2013 made a significant development in the area of efficient enforcement and tougher penalty for the corporate malpractices.

The Companies Act 2013 brought some significant changes in the area of e-governance and corporate social responsibility. It has brought accountability in the mechanism of corporate governance by incorporating accountability of auditors of the company. The act gives protection to the interest of the shareholders who are basically in minority in the company as well as the interest of the investor. As a mechanism for controlling the malpractices of the corporation, the Act had introduced fraud investigation office, national company law tribunal, and mediation and conciliation process. These are introduced in the Act with a view to curb the menace of corporate crime.

In addition to the incorporation of this mechanism, the Companies Act 2013 also incorporated a large number of panel provision for certain acts for combating corporate crime of the corporation. Under this Act, individual criminal liability had been accorded to the person who commits the offence, and side by side the criminal liability had been entrusted on the company also. Minimum sentence of imprisonment also been fixed for some of the offences under the Act of 2013. In each of the chapters of the Act, the criminal liability has been incorporated upon the individual for the violation of the provision of the Act as provided in that chapter⁵. One of the important panel provisions of the Companies Act 2013 is Section-447 where it is stated that making false statement or false evidence is fraud which shall be punishable with imprisonment not less than 3years but may extend to seven years with fine, which may extend to Rupees 10,00,000.

The act of fraud has been defined as any act of concealment or omission of fact, or the position of an individual which is misused with the intention of deceiving others, or to make any unlawful gain to do any act against the interest of the company shareholder or creditor of the company.

⁴ The Report of the working group on the Companies Act, 1956, Government of India, Department of Company Affair, Ministry of finance.

⁵ The Companies Act 2013 (Bare Act), 2017, p 3, Universal Publication

Under this act giving false evidence in any proceeding of winding up of the company or any other proceeding shall be punishable with imprisonment for not less than three years but may extend to seven years and with fine which may also extend to Rupees 10, 00,000.

It is also provided fine of Rupees 10,000 for any contravention of the provision of the Act where no punishment has been prescribed and liability will be imposed on the company or any officer of the company. An additional fine of rupees 1000 per day is to be imposed for the continuance of such offence.

Punishment also prescribed for the repetition of the offence. If any offence under this Act is repeated, then the company and the officer of the company liable for such act shall be punished with a fine of double the amount prescribed for the offence.

A minimum amount of rupees 1,00,000 which may extend to rupees 10,00,000 is prescribed under section 452 of the Act, for unlawful withholding of property of the company, including cash by any officer of the company, if there is any complaint as such by the company.

If the word limited or private limited is used improperly then a minimum fine of rupees 500 per day which may extend to rupees 2000 per day, is prescribed under the act.

For giving wrong information about the charges on the property of the company to the register of company, a company may be punished with a minimum fine of rupees 1,00,000 which may extend to rupees 10,00,000 and every officer of the company shall be punished with imprisonment to the extent of six months or a minimum fine of rupees 25,000 which may extend to rupees 1,00,000.

If any director of the company fails to make payment of the dividend in time then he shall be punished under section 127 of the Act for a term of imprisonment which may extend to two years and shall be fined rupees 1000 for the everyday default.

In case of liquidation of the company, if any officer of the company does not disclose any property, books of account, remove any property, makes any false entry etc. then he shall be punished under section 336 of the Act, with a minimum imprisonment of three years and maximum of five years and shall also be liable to fine of minimum rupees 1,00,000 and a maximum of rupees 3,00,000. At the time of winding up of a company, if it is found that for last two years the account of the company has not been kept properly then the person who is in default shall be liable to imprisonment of a minimum term of one year but which may extend to three years and with fine of minimum rupees 1,00,000 and maximum rupees

3,00,000⁶.

This and many more panel provision have been incorporated in the company that 2013 in order to ensure greater accountability, proper disclosure and transparency in the corporate governance. It is felt that other than these panel restrictions it would be difficult to control the corporate malpractices. And if we don't have a fair corporate practise, it would not be possible to save the society as well as the economy of our country.

III. ADJUDICATION UNDER THE COMPANIES ACT 2013

The system of adjudication under the Companies Act 2013 was initially incorporated. However, the adjudication and trials by administrative authorities is not free from controversies. The administrative authorities are sometime found to be lacking of the skill and knowledge of judicial process; therefore, there are chances of abuse of justice. But the Central Government can appoint as many officers for adjudication as it thinks fit. The adjudicating officers are not to be below the rank of registrar of companies. The adjudicating officers are to hear the parties before imposition of penalties. If the parties become aggrieved by the decision of the adjudicating officer, then they may file appeal to the regional director within two months from the date of such decision. A minimum fine of rupees 25,000 an maximum of rupees 5,00,000 may be imposed in case of any disobedience of the decision of the adjudicating officer or the regional director. And if any person disobeyed the decision of the adjudicating officer or the regional director an imprisonment of six months or a minimum fine of rupees 25,000 and maximum of rupees 1,00,000 or both maybe imposed⁷. Thus the criminality here remedied in the form of compensation.

IV. SOME SERIOUS CORPORATE MALPRACTICES IN RECENT TIME IN INDIA

To understand the criminal corporate responsibility as the consequence of the decriminalization of the penal provision of the Companies Act 2013, some of the incidents of corporate crime of the recent past are mentioned here. After passing of the Companies Act 2013, with its stringent panel provision, a tide of serious corporate offence unfolded in the recent time which shocked the civilized conscience and caused serious harm to the country's economy. The sequence and the modus operandi of those offences clearly revealed the criminal intention behind such acts and it indicate the necessity of penal provision in the companies Act.

⁶ See The Companies Act 2013 (18 of 2013)

⁷ See Section 454 of The Companies Act 2013 (18 of 2013)

In the year 2018, it was flashed in the media that Rupees 11400 crores has been laundered from the Punjab National Bank. A huge irregularity was observed in the transaction by the bank in issuing Letter of Understanding (LoU) to a diamond giant Nirav Modi owner of Taylor Diamond, Solar Export and Diamond for US. Initially the LoU were issued by the bank for smaller amount through the process of Swift without following the CVS. Subsequently the LoU were altered to substantially large amount. This LoU were issued to the overseas branches of Indian banks for imports of pearl. This fund then transferred in the name of dummy company in British Virgin Island and other tax havens. Similar transaction taken place with another diamond joint Mehul Choksi of Gitanjali gems, Gili and Nakshatra. All have left India with their family members when the proceeds of crime⁸of had been initiated.

Again in the year, 2019 it was unfolded another bank scam in Punjab Maharashtra Cooperative Bank of rupees 2500 crores of loan advances to the Housing Development Infrastructure Limited (HDIL). In this regard FIR has been lodged against the the Chairman of HDIL Rakesh Wadhawan and Sarang Wadhawan for money laundering. In this case also it is reported that Wadhwan used the PMC Bank as his personal bank. It was said that Wadhawan had help the bank at the time of crisis by purchasing its share at inflated price. So the loan was not shown in the books of the bank to the RBI as non performing asset in the year 2013 and thereby portrait a rosy picture on the financial statement of the bank⁹.

In a quick sequence another bank scam was reported in March, 2020 .This time it was Yes Bank. The bank offered huge advance to 44 no's of big corporations viz. Reliance group, Essel group, ILFS, DHFC etc. Only the Reliance Group had taken an advance of Rupees 12800 crores. Through this transaction the founder of Yes Bank, Rana Kapoor has earned and kick back off rupees 4300 crores which he has transferred to the Shell company in the name of his wife and his daughters¹⁰.

⁸ Standard, B., 2021. What is PNB Scam | PNB Fraud Case | Nirav Modi Case. [online] Business Standard. Available at: <<https://www.business-standard.com/about/what-is-pnb-scam>> [Accessed 22 August 2021].

⁹ Business Today. 2021. EXCLUSIVE: Vijay Mallya used Kingfisher Airlines to launder Rs 9,990 crore, says ED chargesheet. [online] Available at: <<https://www.businesstoday.in/current/economy-politics/exclusive-vijay-mallya-used-kingfisher-airlines-to-launder-rs-9990-crore-ed-chargesheet/story/279389.html>> [Accessed 22 August 2021].

¹⁰ Business Today. 2021. Yes Bank case: ED arrests DHFL promoters Kapil, Dheeraj Wadhawan. [online] Available at: <<https://www.businesstoday.in/latest/economy-politics/story/yes-bank-case-ed-arrests-dhfl-promoters-kapil-dheeraj-wadhawan-258379-2020-05-15>> [Accessed 22 August 2021].

¹⁰ Business Today. 2021. Yes Bank crisis: Founder Rana Kapoor sent to judicial custody till April 2. [online] Available at: <<https://www.businesstoday.in/latest/corporate/story/yes-bank-crisis-founder-rana-kapoor-sent-to-judicial-custody-till-april-2-252590-2020-03-20>> [Accessed 22 August 2021].

These malpractices in the Corporate Affairs clearly indicate the guilty mind of the corporation and all the higher officials who are in charge of the affair of the corporation. Due to these malpractices inside the bank, a large number of customers have suffered from the lack of liquidity. This act not only cause harm to the millions of investors of those corporations and the banks but also caused harm to the country's economic growth. These malpractices also lead to high starvation rate of the people in the country directly or indirectly. Therefore, this act cannot be considered as civil wrong and are clearly indicate criminal offence.

Changes brought in the amendment of 2019

The Companies Amendment Act of 2019 came into effect on the 31st of July 2019. Some of its provision having respective effect from the 2nd November 2018. The amendment act have 44 provisions out of which there are 17 provision decriminalising the act *hitherto* was criminal offence under the Companies Act 2013. 17 panel provision of the Companies Act 2013 has been brought under the purview of tortious liabilities from criminal liabilities¹¹.

Changes brought under the Companies (Amendment) Act 2020

This amendment is another very significant step in further decriminalizing the provisions of the Companies Act 2013. This amendment was brought on 28th September 2020, in the name of bringing ease in doing business¹². Very serious concession has been given to the companies in the form of decriminalization of the contravention of the important provision of the Company Law. A brief of those amendments are discussed here:

In Section 8 close 11 of the original Act which is a panel provision against the violation of the provision of formation of companies with the term charitable in nature, the word imprisonment for 3years has been omitted. In other Sections also penal provisions and imprisonment provisions were omitted. The section 450 of the original Act which was general provision of punishment for any contravention of the Act, is amended and made it tortious liability¹³.

V. THE INSTANCES IN OTHER COMMON LAW COUNTRIES

In the year 2001 And 2002 The US economy encounter two biggest bankruptcy cases which

¹¹ See Companies (Amendment) Act 2019, (No 22 of 2019), p1, in Government of India Gazette Notification dated 31/07/2019, available at https://www.mca.gov.in/Ministry/pdf/AMENDMENTACT_01082019.pdf

¹² The Hindu. 2021. Economy news, Latest Economic News, GDP, World Economy, Indian Economy. [online] Available at: <<http://www.thehindu.com/business/Economy/govt-approves-amendments-to-companies-act-article30981204>> [Accessed 22 August 2021].

¹³See Companies (Amendment) Act, 2020, No. 29 of 2020, published in <http://www.mca.gov.in/Ministry/pdf>.

badly shocked it. One is Enron and the other is WorldCom respectively. In 1996 to 2000, Enron, which was a world leader in the power sector, has started its high speed broadband service which failed causing loss of hundreds of million dollars. It has started manipulating its books of account by showing the fictitious profit. As a result of which the company declared insolvent in the year 2001. This is clearly due to the wrong and fraudulent policy decision of the high managerial personnel of the Corporation¹⁴.

After Enron, the collapse of the WorldCom, the world biggest telecom service company, had led to the fall of the US stock exchange. The loss sustained by the company during the decline of telecom boom has not been shown in the books of account. To show the continuous growth of the company, profits have shown in the books of account. The loss of the company has been shown as investment. But the investors of the company started suspecting its operation after the fall of Enron. The accounting firm of WorldCom has been convicted for irregularities in accounting in Enron. WorldCom declared bankruptcy in the year 2002. The collapse of the Enron and WorldCom have seriously affected the American economy and shocked the confidence of the investors in the share market. These two incidents of world largest bankruptcy case made the US legislature to realise the impact of the menace and thereby made them to bring a very strict and stringent legislation to curbe the corporate fraud. To prosecute the perpetrator of corporate fraud, the US federal government has brought the Sarbanes-Oxley Act 2002 which is also known as SOX Act 2002¹⁵. The financial officers of WorldCom were arrested and paraded before the TV camera in New York by the then Bus administration to have a deterrent effect of the corporate fraud.¹⁶

VI. LEGISLATIVE REFORM IN USA AND AUSTRALIA ON CORPORATE CRIME

In order to put cheque on the corporate fraud, common law countries, mainly the USA and Australia had subsequently enacted very strict legislation. In the year 2002, the SOX Act 2002 has been enacted to ensure very strict internal control in the corporation government. SOX Act 2002 ensures that the corporation cannot be used vehicle of commission of crime. This act empowers the auditor and the lawyer of the Corporation to act as a gatekeeper and impose liability on them to control the commission of the crime. Very strict sentencing mechanism has been incorporated in the act to prevent the abuse of the corporate model for

¹⁴ Brickey Kathleen F, In Enron's Wake: Corporate Executive on Trial, Corporate Criminal Liability- some insight, p 162, Amicus Book, ICFAI University Press.

¹⁵ Investopedia. 2021. WorldCom. [online] Available at: <<https://www.investopedia.com/terms/w/worldcom.asp>> [Accessed 22 August 2021].

¹⁶ the Guardian. 2021. WorldCom accounting scandal. [online] Available at: <<https://www.theguardian.com/business/2002/aug/09/corporatefraud.worldcom2>> [Accessed 22 August 2021].

the perpetration of crime. The SOX Act 2002 give a strict signal to the judges that there shall not be any leniency towards the corporate or white colour offenders. The federal judges of the US started giving strict punishment to the CEO and the high managerial officers who lead their corporation to ruin, of the longer term of imprisonment. The CEO of WorldCom Was sentence to 25 years of imprisonment whereas, The CEO of Enron has been sentenced of over 24 years of imprisonment¹⁷.

The SOX Act 2002 has created four categories of offence which are similar to that which are incorporated in India in Companies Act 2013. These offences are: 1. security fraud, 2. CEO /CFO certification, 3. Destruction of record at the time of investigation for bankruptcy, 4. Destruction of the record during audit. Unlike the Companies Act 2013 Of India, the SOX Act 2002 has introduced a very severe punishment of longer term off 25 years. The term of imprisonment increases even more with the increase on the loss and the number of victims of the offence¹⁸.

Prior to that, in the year 1995 Australia enacted the federal legislation for curbing the corporate fraud, the Australian Criminal Code Act 1995 (CC Act 1995) which came into effect in 1999. Though this law is not binding on the states but they may implement this law or they may make separate legislation. This law is applicable for *mens rea* offence that is where intention, recklessness or knowledge is involved. In such offences the criminal liability may be attributed to the Corporation¹⁹. This law is this step advanced from the SOX Act 2002 of USA as it consider along with the theory of identification, the structure and system of the corporation which is called as *corporate culture* for deciding the criminal liability. The corporate culture of any corporation is defined in a detailed manner which include the attitude of the Corporation, that its policy, rules and course of conduct. This theory has been incorporated in this law in order to do a way the difficulty of the application of identification theory. Identification can only be applied in small and medium size corporation but it is difficult to apply in case of large MNC. In the CC Act 1995, for the conduct of the employee or agent or the high managerial officer, the criminal liability can be attributed to the corporation 82²⁰. Even if the fault is expressly or impliedly authorised by the corporation then

¹⁷ Alexei Barrionuevo, Skilling Sentenced to 24 Years, N.Y.Times, Oct 24,2006, atC1, cited in Brickey Kathleen F, In Enron's Wake: Corporate Executive on Trial, Corporate Criminal Liability- some insight, p 162, Amicus Book, ICFAI University Press.

¹⁸ US Sentencing Manual 2B1. 1(b)(1), (2003), available at <https://www.ussc.gov/guidelines/archive/2003-federal-sentencing-guidelines-manual>, visited: 17 January 2021.

¹⁹ See section 12.3 of the Criminal Code Act 1995, available at:<https://www.legislation.gov.au/Details/C2017C00235>, visited: 17 January 2021.

²⁰ See section 12.2 of the Criminal Code Act 1995, available at:<https://www.legislation.gov.au/Details/C2017C00235>, visited: 17 January 2021.

also criminal liability can be attributed to the corporation. If it is found that the board of directors have knowingly committed the offence or the high managerial officer have engaged authorised the commission of the offence, then the criminal liability can be attributed to the corporation. The most significant feature of this act is that in addition of the above conditions, if it is found that there exist a culture in the corporation which promote or encourage the noncompliance of the rules or there is failure on the part of the corporation to create a culture of compliance of the rule then also the criminal liability can be attributed to it²¹. It is stated that if there is a reasonable expectation of the high managerial official of the commission of the offence then also the criminal liability can be attributed on the corporation. The Corporation is not held liable for the wrongful act of its agent but it is liable for the negligence of its high managerial official for not having the knowledge of such conduct of its agent. Therefore, this law has been considered a very significant development in the field of corporate criminal liability among the other similar legislation. This law thereby almost near to the application of the doctrine of respondent superior of the USA²².

The offending acts of corporation in the form of fraud, negligence and various other mal practices are of criminal nature. The Supreme Court of India reiterated that such act of corporation cannot fall short of criminal act, nonetheless, these act cannot be considered as tort or civil wrong. In such situation decriminalisation of such acts in no way be reflected the legislative wisdom of our legislature, nevertheless, such legislation may cause serious harm in our society and economy of our country.

VII. CONCLUSION

The seriousness of the legislator of other common law countries in the matter of curbing the corporate crime by enacting strict penal legislation has been reflected from the effectiveness of the laws. On the other hand when there are instances of corporate fraud, malpractices and negligence occurred in every other day as a regular practice and create havoc in the economy and in the mind of the common people, the decriminalising those provision in the Companies Act 2013 by this amendment can act as encouragement to the corporate offenders. There is serious lack of information in Indian society about the criminal law and the structure of governance and mode of working of corporation. In this situation there is a perception developed in the mind of the common people that it is impossible to control the crime by the corporation. This perception rapidly reducing the confidence of the common people and the investors on the corporation. In this situation more stringent legislation and expedite procedure of prosecution is required to restore the confidence of the common people and the investors in the

²¹ See section 12.3 (1) of the Criminal Code Act 1995, available at:<https://www.legislation.gov.au/Details/C2017C00235>, visited: 17 January 2021.

²² Wells Celia, *Corporation and Criminal Liability*, Edn 2nd, Kindle.

corporation, otherwise it will lead to more harm than cure.
